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IN THE

Supreme Court of the United States

October Term, 1962

No. 1063

WM. H. SIMMONS, *Petitioner*,

THE STATE OF WASHINGTON, on the Relattion of Charles O. Carroll, Prosecuting Attorney for the County of King, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

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THE STATE OF WASHINGTON, on the Relation of Charles O. Carroll, Prosecuting Attorney for the County of King, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Petitioner herein respectfully asks for review, through Certiorari, of that Judgment of the Supreme Court of the State of Washington wherein Petitioner's appeal from a trial court's summary judgment forfeiting his claim to his public judicial office and ousting him therefrom was denied, and shows this Court as follows:

OPINIONS BELOW

No formal opinion was written by the trial court; that is, the Superior Court of the State of Washington. The Supreme Court of Washington, on appeal, rendered a decision which has not, as yet, been officially reported in a bound volume of the state reports.

it may, however, be found in the National Reporter system as *State v. Simmons* 377 P. 2nd 421. This opinion appears in full in the Appendix hereto.

JURDISDICTION

(a) Grounds: The jurisdiction of the United States Supreme Court is invoked on Federal Constitutional Grounds, viz: Failure of the Washington Supreme Court to uphold the provisions, of Article I, Section 10, as the same relates to bills of attainder and Amendment XIV, Section 1, as the same relates to procedural and substantive due process and equal protection of the laws and to strike down a state statute; i. e., RCW 9.92.120 in conflict therewith. These precise issues were properly preserved and presented to the Washington Court.

(b) Date of Judgment: The date of entry of the Judgment sought to be reviewed is January 28, 1963.

(c) Statutory Provisions: Title 28, Section 1257 confers jurisdiction to review this matter by Writ of Certiorari.

QUESTIONS PRESENTED

(a) Does the following Washington Statute:

> "The conviction of public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state." (Revised Code of Washington 9.92.120

do violence to the provisions of Article I § 10 of the United States Constitution, as the same relates to

states passing bills of attainder? Particularly, as in the instant case, where the statute was summarily enforced and the alleged conviction forming the basis for the operation of the statute was suffered to flow from a proceeding wherein there was no semblance of a fair trial? (See argument, infra)

(b) Does enforcement of the above statute as a self-executing self-contained institution violate the due process and equal protection provisions of the Fourteenth Amendment? In other words, will our constitutional due process and equal protection provisions stand mute to the automatic infliction of punishment by statute?

CONSTITUTIONAL PROVISIONS

"No State shall . . . pass any bill of attainder . . ."

Article I, § 10,
Constitution of United States

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV,
Constitution of United States

STATEMENT OF THE CASE

In November, 1958, Petitioner was elected to a four year term as Judge of Department Two of the Municipal Court of the City of Seattle. Department two is the Traffic Court. Petitioner thereafter qualified by filing his official bond, taking his official oath and assuming his duties as Municipal Judge.

In August of 1960 Petitioner was, by Information, charged with the crime of assault in the second degree. This was a felony charge of assault with intent to commit rape.

A jury trial was held on said charge and in December of 1960 the jury returned a verdict of guilty. Motions for a new trial were wrongfully denied. Judgment and sentence followed in February, 1961. The sentence imposed was ten years in the state penitentiary, suspended on condition Petitioner resign his public office within forty-eight hours. Petitioner refused and appealed. The case was reversed. It was later dsmissed over Petitioner's objection.

In March of 1961 the Respondent herein commenced quo warranto proceedings to oust Petitioner from office. These proceedings were resisted. They are the proceedings precipitating the present petition.

In the quo warranto proceeding the trial court ruled that the statute RCW 9.92.120, supra and infra, created an automatic forfeiture of Petitioner's public office and, consequently, left the same vacant. The trial court thereafter granted Summary Judgment declaring the office forfeited and ousted Petitioner therefrom.

Petitioner appealed and on appeal presented several questions among which were the two now presented in this petition.

FEDERAL QUESTIONS

Federal questions were presented to the trial court by way of argument on special appearance, prior to the entry of the judgment of forfeiture and ouster.

These questions were amplified and specifically assigned as error on appeal.

The federal questions herein presented were properly and timely raised and presented to the Washington Supreme Court by assignments of error and specific oral arguments and specific written arguments in Petititoner's appellate brief. Further, the Washington Court passed upon same.

The question raised and now presented concerning the statute being a bill of attainder was passed upon and answered thusly:

> "The appellant contends the statute, supra, is a bill of attainder which violates Article 1 § 9 of the United States Constitution in that it imposes a legislative penalty without due process of law.
>
> As heretofore stated, the statute relates only to a person's rights in a criminal proceeding. The statute does not contravene this provision of our federal constitution." (*State v. Simmons* 377 P. 2nd 421, set out in Appendix)

It is here noted that the Washington Court refers to Article 1 § 9 rather than Article 1 § 10. The provisions of § 10 were raised and argued. Why the Washington Court refers to Article 1 § 9 in lieu of Article 1 § 10 is unknown.

The question now raised in this petition concerning due process and equal protection of the laws was also passed upon. It was answered as follows:

> "RCW 9.92.120, in no manner denies one holding public office the right of these constitutional guarantees. It relates only to the qualifications of

a person to hold public office . . . and, applies equally to all persons holding public office except those liable for removal by impeachment." (*State v. Simmons* 377 P. 2nd 421, set forth in Appendix)

ARGUMENT

The State of Washington has, as law, the following statute:

> "The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state." (Revised Code of Washington 9.92.-120)

Petitioner claims this statute is a bill of attainder and, as such, violates Art. 1 § 10 of the federal constitution. In searching the law we find very few cases involving bills of attainder. Among these, however, are two important decisions from the U. S. Supreme Court. The first is *Cummings v. The State of Missouri* 4 U.S. (Wallace) 277, decided in 1866; and the second is *United States v. Lovett*, 328 U. S. 303, 66 S. Ct. 1073, decided in 1946.

From a careful reading and study of these two cases we may perceive and determine with certainty the meaning of the phrase "bill of attainder," the applicability of same to appropriate situations and the wisdom of the existence of such a constitutional provision. These two U. S. decisions are the result of considerable thought—they reach to the rudimentary depths of constitutional law. They should not be taken lightly. The latter decision refers to the former as "an illuminating opinion."

These two cases clearly reveal that the above quoted statute comes within that evil our federal constitution seeks to avoid by prohibiting states passing bills of attainder. These two cases were presented to the Washington Court, in connection with this question. They were quoted at length in the appellate brief and the Washington Court failed to adhere to same. These two cases have pre-determined with exactness the correct result which should follow any issue concerning a bill of attainder but the Washington Court did not understand same.

In *Cummings v. Missouri*, the U. S. Supreme Court said:

> "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any right, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment."
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in pursuit of

happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of these rights for past conduct is punishment and can be in no otherwise defined.

"Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivations or suspension of political or civil rights, . . ."

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of a trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

"These bills are generally directed against individuals by name; but they may be directed against a whole class."

"These bills may inflict punishment absolutely, or may inflict it conditionally."

"The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing not the name. It intended that the rights of a citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised."

In *United States v. Lovett*, the U. S. Supreme Court said:

> To quote Alexander Hamilton: '* * * * a limited constitution * * * * (is) one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.' Federalist Paper No. 78."
>
> "In an illuminating opinion which gave the historical background of the Constitutional prohibition against bills of attainder, this court invalidated the Missouri constitutonal provision both because it constituted a bill of attainder and because it had an *ex post facto* operation . . . Neither of these cases [*Cummings v. Missouri* and *Ex Parte Garland* 4 U. S. (Wallace) 333] has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Section 304. We do adhere to it."

Petitioner submits, that if these two decisions are read with care the reader will find it difficult to render the issues more precise or the meaning more clear.

The Washington Court, as noted, also had the question of whether or not RCW 9.92.120 denied Petitioner due process and equal protection of the laws, as guar-

anteed by the Fourteenth Amendment. Petitioner claims that summary enforcement of the statute denied him due process of law and equal protection of the laws.

There is no doubt but what RCW 9.92.120 purports to impose severe and drastic penalties. By its terms it declares: ". . . in addition to such other penalty . . ." And, it appears to serve no other purpose.

Petitioner's position concerning deprivation of due process and equal protection of the laws is simply this:

It is not constitutional in a criminal trial to deprive the defendant, through abuse of judicial discretion, of an impartial jury; to deprive him, through abuse of judicial discretion, of the right to introduce material evidence; to, over adequate objections, allow prosecutors to ask questions "which were obviously designed to prejudice" and were "completely inexcusable and can have no conceivable justification;" and, to deny him "any semblance of a fair trial" and thereafter conclude that a valid conviction results. (cf: *State v. Simmons* 59 Wn. (2d) 381, 368 P. 2d 378)

It is not justice to take such a "conviction" and declare the same, without further concern, to have force enough to give automatic life to the provisions of RCW 9.92.120.

Such a conviction is not born of due process or equal protection of the laws but, on the contrary, is totally void of these life giving essentials and, consequently, cannot breathe this life of justice into any statute or proceeding. Any statute or proceeding based thereon

must needs be without constitutional life.

The Washington Supreme Court declared that Petitioner's criminal trial bore no "semblance of a fair trial." (*State v. Simmons* 59 Wn. (2d) 381, 368 P. 2d 378) Of the twenty assignments of error in Petitioner's criminal appeal, the Washington Court said: "At least half of the twenty assignments of error on this appeal have some merit." (Ibid.) One of the jurors concealed facts on voir dire examination and concerning this juror the Washington Court said: ". . . no defense counsel in his right mind would have permitted her to remain on the jury had he known of it." (Ibid.)

The due process issue in the instant case is not unlike that in *Kennedy v. Mendoza-Martinez*, 83 S. Ct. 554 (1963) where the Court said:

> "That issue is whether the statutes here, which automatically—without prior court or administrative proceedings, forfeit citizenship, are essentially penal in character, and consequently, have deprived appellees of their citizenship without due process of law . . ."

It might be asserted, in the instant case, that Petitioner was afforded a prior court proceeding. But, how does a rational judicial mind correlate, with harmony, the mischievous conviction referred to and the following passage from *State v. Simmons* 377 P. 2d 121, in Appendix:

> ". . . The statute . . . is unrelated to a person's rights in a criminal proceeding."

The Washington Court, by these words, has said, in effect, go thither with your rights in the criminal case, however, so far as necessary we will use the result of

the criminal proceeding to give effect to the statute. Is this justice?

The Washington Court has also declared:

> "The quo warranto proceeding judicially determined that the qualifications had not been met to permit his further continuance in office. He was afforded due process by this determination." (*State v. Simmons* 377 p. 2d 421, in Appendix)

Here, again, the Washington Court seeks to justify a judicial determination using the criminal case as its premise. A determination is but a conclusion and must be based on due process. The determination, as such, is not due process—it is but a result.

CONCLUSION

Petitioner submits that the federal questions here presented were properly before the Washington Supreme Court; were directly ruled upon by that Court and, that the rulings thereon conflict with the federal constitutional provisions hereinabove alluded to as well as the decisions of the U. S. Supreme Court. Further, that it would be reasonable for this Court to exercise its discretion in favor of granting this Petition.

Respectfully submitted.

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